SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1282

ARNOLD ROMANO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No.

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—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Arnold Romano, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on February 23, 1967.

Opinions Below

Neither of the Courts below wrote an opinion.

Jurisdiction

The judgment of the Court of Appeals was entered on February 23, 1967 (Appendix hereto, *infra*). By order of Mr. Justice Harlan, the time for filing this petition for certiorari has been extended to and including April 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Petitioner was convicted of bail-jumping in violation of former 18 U.S.C. §3146. The case in which the alleged bail-jumping had occurred was a narcotics conspiracy prosecution. The questions are:

1. Is the bail-jumping statute unconstitutional on its face, or as here applied, in that, in a case of bail-jumping which relates to bail under a charge of felony, and where the bail-jumping charge is tried before a Jury, the defendant becomes unjustifiably subjected to the jurors' being given knowledge that he was under a charge of felony, thereby violating due process of law though unnecessarily and unjustly prejudicing the defendant within the meaning of the "other crimes" principle, and indeed causing such prejudice in an even more aggravated manner than in cases involving a defendant with prior convictions since here the Jury got knowledge of a prejudicial fact which was surely not admissible in evidence at all in the ordinary course of a criminal trial, namely, the fact that the defendant had previously been *accused* (rather than convicted) of a felony? Cf. *Spencer* v. *Texas*, U.S. , 17 L. Ed. 2d 606.

2. Supplementing Question 1, *supra*, where the felony charge involved happens to be one of special odium, as in the instant case of bail-jumping in a narcotics conspiracy prosecution, does not the defendant in effect become forced also to surrender his privilege against self incrimination as to the prior felony charge, since for all practical purposes he is obliged to concede or stipulate the prior felony aspect in order to avoid revealment by the Government of the more precise nature of the prior felony charge which would bring in the added odium of the narcotics charge?

3. Was petitioner denied a fair trial on the issue of the validity of the bail bond alleged to have been violated by him, where there was evidence for the Jury that the bond was invalid and totally inoperative because petitioner, having never signed the bond, was not bound by it, and where the Trial Court refused to instruct the Jury as to the theory of the defense in that latter regard even though, we repeat, there was evidence in support of such defense theory?

4. Was petitioner denied due process of law through unreasonably being refused a sufficient opportunity to prepare his defense on the issue of whether he had in fact signed or executed the bail bond whose forfeiture was an element to be proved in establishing his alleged guilt of the indictment charges?

Constitutional Provisions and Statutes Involved

The case involves the due process and self-incrimination clauses of the Fifth Amendment of the United States Constitution. It also involves former 18 U.S.C. §3146 (bail-jumping) which reads as follows:

> "§3146. Jumping bail.
>
> Whoever, having been admitted to bail for appearance before any United States commissioner or court of the United States, incurs a forfeiture of the bail and willfully fails to surrender himself within thirty days following the date of such forfeiture, shall, if the bail was given in connection with a charge of felony or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or, if the bail was given in connection with a charge

of committing a misdemeanor, or for appearance as a witness, be fined not more than $1,000 or imprisoned not more than one year, or both.

Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt.'"*

Statement of the Case**

Petitioner was convicted in the United States District Court for the Southern District of New York (McGohey, D.J.), after a Jury trial, of bail-jumping in violation of former 18 U.S.C. §3146, and he was sentenced to five years (37a). The United States Court of Appeals for the Second Circuit affirmed the conviction, without opinion (Appendix hereto, *infra*)—the Court of Appeals announced its affirmance of the conviction from the Bench, at the conclusion of

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* Section 3146 was repealed by Section 3(a) of the Bail Reform Act of 1966, 80 Stat. 216, effective September 20, 1966. Its provisions were incorporated and expanded into the present 18 U.S.C. §3150 (1966).

** By permission of the Court of Appeals, petitioner was permitted to prosecute his appeal in that Court on typewritten briefs and a non-printed Appendix. Petitioner's Appendix in the Court below did not include any testimony. " a", *infra*, refers to the "Appellant's Appendix" (non-printed) in the Court below. We regret that extra copies of the latter Appendix are not available for filing herewith; one copy thereof is included, of course, in the certified record herein filed. The Government, in the Court below, printed an "Appendix For The United States of America", nine extra copies of which are filed herewith; that Appendix likewise contained no testimony but was confined to excerpts from certain pretrial proceedings, bearing on the issues presented by our Question Presented 4, *supra* —the question of unreasonable refusal of sufficient opportunity to prepare the trial defense on the issue of validity of the bail bond. References to the testimony or to other matters in the record which are not contained in the appendices of the parties in the Court below are cited *infra* as "R. ".

the oral argument, evidently deeming the appeal to be so indubitably lacking in merit as to require no further deliberation or the rendering of a written opinion.*

The indictment (4a) charged as follows:

> "On or about May 28, 1965, in the Southern District of New York,
>
> ARNOLD ROMANO
>
> the defendant, having been admitted to bail on October 1, 1964, in the amount of $50,000, for appearance before the United States District Court for the Southern District of New York, said bail having been given in connection with a charge of felony contained in Indictment No. 64 Cr. 828, did incur a forfeiture of the said bail on or about April 27, 1965, and unlawfully, wilfully and knowingly did fail to surrender himself within thirty days following the date of such forfeiture.
>
> (Title 18, United States Code, Section 3146)."

(The charge of felony in indictment no. 64 Cr. 828, which is referred to in the above quoted indictment, related to a narcotics conspiracy case in the Southern District entitled *United States* v. *Armone et al.* As will appear, the Jury in the instant trial was properly not told that the bail jumping

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* We are thus calling rather prominent attention to the evidently very poor view which the Court of Appeals took of the merits of our appellate contentions, because we are quite acutely conscious of counsel's duty to refrain from burdening this Court with "time-wasting" petitions for certiorari, and since the present petition for certiorari comes before this Court against a background of such exceptionally poor auspices in the Court below, we have respectfully felt that it may be proper for us, as counsel, to state that we would not have accepted petitioner's case for presentation to this Court if we were convinced that the case is so patently unworthy of serious judicial consideration as the Court below has signified.

involved a narcotics charge; but, as we urge *infra*, it was also constitutionally wrong to let the Jury know that a "felony" was involved.)

The Government introduced the following proof at the trial: RICHARD D. DILBERIAN, a Court Clerk and Motion Clerk in the Southern District of New York, testified that on April 27, 1965 District Judge Bonsal had ordered forfeiture of bail as to Romano, and that the Court records contained no entry of a surrender by Romano within thirty days after said forfeiture (R. 32-38, 48-49).* GEORGE WARREN SENGE, JR., the bail bondsman on the bond here involved, testified for the Government (R. 49 *et seq.*). A bail bond in the amount of $50,000 had originally been executed by Romano in the District of Columbia on July 27, 1964, which was for his appearance before the United States Commissioner and the United States District Court for the District of Columbia (R. 50-54, Gov'ts Exh. 5);** it is undisputed that this bail bond of July 27, 1964 is of no effect for the purposes of this prosecution. Subsequently, on October 1, 1964, in connection with proceedings to remove Romano from the District of Columbia to the Southern District of New York, there was executed, according to the witness Senge, a second "appearance" bail bond in the amount of $50,000, done on a form or blank identical with that used for the first bail bond (R. 53-55, Gov'ts Exh. 6).* It is this

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* The bail-jumping statute here involved (former 18 U.S.C. §3146—quoted *supra*) speaks of a wilfull failure to surrender within thirty days after forfeiture of bail.

** We are requesting the Clerk of the Court of Appeals to make the original exhibits—of the above mentioned bail bond and of the bond of October 1, 1964 (*infra*)—available to this Court.

* See last preceding footnote.

second alleged bail bond which the Romano defense contended in this trial had not been signed or executed by Romano. The defense brought out in the cross examination of the witness Senge (R. 56-59), as well as from the matters shown on the face of the two bail bonds (Gov'ts Exh's 5, 6), that the bail bondsman, or someone else, had evidently used, for the purposes of the second bail bond, a form which Senge (or someone) may apparently have had Romano sign in blank at a previous time. The allegedly operative bond—the bond dated October 1, 1964 (Exh. 6)—when compared with the earlier bond of July 27, 1964 (Exh. 5), shows on its face that it is altogether believable that both of these bonds had been signed by Romano at the same time, which would have been at the time of the signing of the earlier bond. The two documents show even an indicated use by Romano of the same pen in signing. Other discrepancies pointing to the questionable validity of the October 1st bond were summarized by the defendant's trial counsel at R. 133-139. As for the cross examination of the bail bondsman Senge—which, together with the indicia of discrepancy appearing on the face of the two bonds, formed the heart of the defense case at the trial—a fair reading of that cross examination (R. 56-99) reveals, *inter alia,* that Senge really had no recollection at all of Romano's allegedly having signed the bond of October 1, 1964; that Senge was "presuming", "inferring", "assuming" and "guessing" that such had occurred, from a combination of "knowledge" on his part derived from what appeared on the document itself, his general acquaintanceship with the procedures of his bail-bonding practice, his acquaintanceship with the Clerk of the Court in the District of Columbia, etc.

FBI AGENT THOMAS E. MALONEY testified as to Romano's having been apprehended on July 29, 1966 in Fort Lauderdale, Florida, on the bail-jumping charge; the agent said that Romano had claimed a false identification and that papers seized from him listed a false name (R. 102-112). THOMAS J. DUGAN, a Government agent, identified Romano as being the same individual whom he had seen pleading not guilty to the underlying indictment herein on October 9, 1964 (R. 112-114). NICHOLAS RENZI testified that Romano had rented an apartment, under another name, in the Fort Lauderdale area, on May 1, 1965, and that he had stayed there about one year (R. 119-123). The Government also read into the record portions of a proceeding before Judge Bonsal on April 6, 1965 indicating that the Judge had instructed defense counsel in the *Armone* narcotics case on that occasion to notify their clients to be present for trial April 27, 1965 at 10:00 A.M.; and another portion from proceedings before Judge Bonsal on April 27, 1965 indicating that Romano's trial counsel had told Romano that he was expected to be in Court for trial at that time (R. 126-130).

The foregoing concluded the Government's case at this trial (R. 130).

The defense did not introduce any evidence, protesting that it had been denied a reasonable opportunity to prepare its case. The facts concerning this latter aspect of the case are recited under our "Reasons", *infra*, where we also present the facts as to the prejudice caused to petitioner by the practically automatic and inevitable disclosure to the Jury that the bail-jumping charge involved a prior charge of felony.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to review the judgment of conviction because it rests upon a statute (former 18 U.S.C. §3146) which is unconstitutional on its face, or as here applied, in that, in a case of bail-jumping which relates to bail under a charge of felony, and where the bail-jumping charge is tried before a jury, the defendant becomes unjustifiably subjected to the jurors' being given knowledge that he was under a charge of felony. Moreover, where the felony charge involved happens to be one of special odium, as in the instant case of bail-jumping in a narcotics conspiracy prosecution, the defendant in effect becomes forced to surrender both his privilege against self incrimination, and his due process right to resist admission of improper evidence, as to the prior felony charge since for all practical purposes he is obliged to concede or stipulate the prior felony aspect in order to avoid the added odium of the narcotics charge.

As seen, the charge of bail-jumping herein was founded on a statute (former 18 U.S.C. §3146) which structures the elements of the offense in terms of the accused's having incurred a forfeiture of bail, and having wilfully failed to surrender himself within thirty days after such forfeiture. The statute further treats bail-jumping in felony cases differently from misdemeanor cases, heavier punishment being provided for the former. (The statute is quoted at p. 3, *supra.*)

The contention urged in the above heading was not raised on defendant's behalf in the Trial Court. We raised the point in the Court of Appeals, invoking the rule that where

a question of statutory constitutionality "is inherently fundamental", the point may and indeed needs to be considered by an Appellate Court even if at the Appellate Court level itself the constitutional validity of the statute "is not assailed" and "the subject [is] passed without discussion by any of the parties". *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific R. Co.*, 294 U.S. 648, 667. The constitutional issue tendered in the above heading "is inherently fundamental" in this criminal case. In any event, we urged in the Court of Appeals, and we here urge, that the point be considered under the "plain error" rule.

Before analyzing the wording and the impact of the statute here involved (former 18 U.S.C. §3146) from the constitutional standpoint here being urged, we may note that the general area of constitutional prejudice in which we are advancing this argument is the area which this Court extensively re-surveyed in its recent decision in *Spencer* v. *Texas,* U.S. , 17 L. Ed. 2d 606, that is, the problem commonly termed "other crimes evidence". See also *United States* v. *Bozza,* 365 F. 2d 206, 213 (C.A. 2, 1966). See also, as being analogous to our own situation, District Judge Weinfeld's treatment of this problem in *United States* v. *Verra,* 203 F. Supp. 87, 89-90 (S.D.N.Y. 1962), where it was held that a prior conviction may not properly be brought to the Jury's attention in a subsequent prosecution of the defendant for obstructing justice in connection with the trial where such prior conviction was obtained.

Let us now examine the way in which the instant bail-jumping statute (former 18 U.S.C. §3146) carries, as we

respectfully contend, a literally built-in or automatic violation of the "other crimes" rule. The statute evidently makes it one of the elements of jury proof, where a prior charge of felony is involved in connection with the bail-jumping, that such felony be established to the satisfaction of the jurors. In the course of our further discussion *infra* we expect to demonstrate that such is the necessary meaning of the statute. But even if we are wrong as to that—i.e., even if the statute on its face does not compel the reading just suggested—the situation from a constitutional standpoint is not altered for our case because the statute *as applied* in our case was ineluctably cast into the constitutionally impermissible form (i.e., as calling for revealment to the Jury of the prior felony charge) when the Grand Jury chose to write this particular indictment in the way they did. The indictment is quoted at p. 5, *supra*, and it is written in the terms of the statute, that is, it alleges that the bail involved had "been given in connection with a charge of felony contained in Indictment No. 64 Cr. 828" (4a).

The record makes it altogether clear that the existence in the statute and in the indictment of this aspect or element of prior charge of felony had the effect of confronting the defense with the Scylla-Charybdis choice of either stipulating to the *factum* of the prior charge of felony or of incurring the risk that the Jury would have to be told that the prior charge was a narcotics felony charge (e.g., R. 16-17, 20-21). And the jury were in fact informed that a prior charge of felony was involved (R. 200; 35a). Unfortunately the defense at this trial did not protest against the implications of statutory unconstitutionality in this regard which we are here urging; but, as above said, fundamental con-

siderations of Federal appellate justice are believed to entitle us to urge the point now.

In order to understand in a constitutionally more ample manner the impact of the instant statute in this particular case as working a violation of the "other crimes" rule and of the Constitutional setting of that rule in terms of due process and self-incrimination, it becomes necessary to note the legislative history of that statute, and its relationship to other Federal criminal legislation which deals with bail-jumping or fugitivity.

Former 18 U.S.C. §3146 (the statute here involved) was derived from the act of August 20, 1954, Chapter 772, Public Law 603, 83rd Cong., 2nd Sess. In the legislative history materials for this statute which are available in *U.S. Code Congressional and Administrative News,* 83rd Cong., 2nd Sess., 1954, Vol. 2, pp. 3074 *et seq.*, it is revealed that this legislation was enacted during and under the specific spur of what we nowadays in cooler attitude remember as the "McCarthy Era". Both the Congressional reports and the Attorney General's communication to Congress requesting this legislation cited, as justifying the necessity therefor, that certain Communist defendants had jumped bail (*id.*, pp. 3074, 3075). We respectfully mention these painful historical circumstances concerning the genesis of this legislation, because we think such may serve to explain the evident slippage of constitutional sensitivity into which both the Congress and the Attorney General fell in some of their wording in this legislation; and, as will appear, the quite recent change in this legislation (details *infra*) may well bespeak a belated restoration of a sense of proper constitutional standards in this area.

The above cited 1954 legislative history materials also state that, " * * * at the present time, if a defendant jumps bail this in itself does not subject him to a criminal penalty" (*id.*, pp. 3074-3075); this apparently refers to the fact that absent bail-jumping legislation of the kind here involved, the matter would be subject to be dealt with only under the contempt power of the Federal District Courts.*

Our suggestion just now that a certain intemperateness may have been at work in the drafting of the 1954 legislation, was made, with all respectful deference, as a part of our contention herein that it may well have escaped the attention of conscientious and responsible Federal legislators and legislative draftsmen that, in writing and enacting the former 18 U.S.C. §3146, there occurred an act of legislative disregard for the "other crimes" rule.

Now, as of the enactment of the new 18 U.S.C. §3150, added June 22, 1966, effective ninety days thereafter, superseding the instant former §3146, there appears to be a quite different treatment of the problem of disclosing to a Jury that an alleged bail-jumping defendant committed the alleged offense in connection with a prior charge of felony. We quote the new 18 U.S.C. §3150:

> "§3150. Penalties for failure to appear
>
> Whoever, having been released pursuant to this chapter, willfully fails to appear before any court or judicial officer as required, shall, subject to the provisions of the Federal Rules of Criminal Procedure, incur a forfeiture of any security which was given

* The contempt avenue would more probably avert prejudicial disclosure to a lay jury of the fact of a charge of prior felony; but cf. *Harris* v. *United States*, 382 U.S. 162; *United States* v. *Barnett*, 376 U.S. 681.

> or pledged for his release, and, in addition, shall, (1) if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both, or (2) if he was released in connection with a charge of misdemeanor, be fined not more than the maximum provided for such misdemeanor or imprisoned not more than one year, or both, or (3) if he was released for appearance as a material witness, shall be fined not more than $1,000 or imprisoned for not more than one year, or both. Added Pub. L.89-465, §3(a), June 22, 1966, 80 Stat. 216."

The above quoted provision was adopted as part of the Bail Reform Act of 1966. See *U.S. Code Congressional and Administrative News*, 89th Cong., 2nd Sess., Pamphlet Issue No. 6, July 5, 1966, pp. 1531 *et seq.*, at 1534; and *id.*, 1629 *et seq.*, at 1641-1642. It is manifest, at a glance, that this new legislation (§3150) is not so geared of necessity, as was the 1954 legislation, to a prosecutive showing before a Jury that a person accused of bail-jumping must be subjected to the trial Jury's being told that he may have been under a prior charge of felony in connection with the bail involved. The new statute, unlike the 1954 statute, is drawn much more distinctly in terms of a *punishment* differentiation dependent upon the element of prior felony. Under this new legislation, indeed, it is all but explicitly indicated that the question of felony *vel non* would not even come up at all until the sentencing stage; so that it would appear, further, that in prosecutions under this new legislation it would become incumbent upon the United States Attorney and the Trial Court to work out a proper procedure, post-

verdict, for determining the question of penalty in relation to felony *vel non*, i.e., a post-verdict procedure comparable to the separate filing of an information in "multiple offender" cases in State Courts.

To be sure, the Government, and the Court below, might have used a similar post-verdict procedure in our case; but the indictment did not so contemplate—nor, we contend, did the then applicable statute—and no such procedure was employed in our case.

The Government argued in the Court of Appeals that the defense waived any objection to the constitutionality of the statute. This does not meet our contention, *supra*, that the defense was confronted at the trial with a Scylla-Charybdis choice of either stipulating to the fact that the bail jumping related to a prior charge of a felony, or of letting the Jury find out that the prior charge was a narcotics felony charge. The failure of the defense to protest against being confronted with this choice cannot conceivably be construed as a knowing or voluntary waiver, because it is self evident that the defense at the trial was not aware of the constitutional point we raised in the Court of Appeals and are now raising. Therefore, as suggested *supra*, the only real question as to our right to raise the point for the first time on appeal is the question of whether the rule permitting such to be done where the issue of statutory constitutionality "is inherently fundamental" should be followed here. *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific R. Co.*, 294 U.S. 648, 667. The Government in the Court below did not challenge the applicability of the latter rule in this case; the Government

took its stand, instead, on the argument of waiver, and that argument is without merit, as just seen.

The seriousness of the constitutional issues presented by the "other crimes" complication which was brought into this case by reason of the wording of the bail jumping statute (former 18 U.S.C. §3146) is accented by the decision of January 23, 1967, in the closely analogous situation of the Texas State "recidivist" legislation, *Spencer* v. *Texas,* U.S. , 17 L. Ed. 2d 606, where the Court divided five to four in sustaining the legislation against a due process challenge based on the "other crimes" principle, but where the Court in the main opinion for the majority expressly noted its reluctance to interfere with State criminal prosecutions in this regard as contrasted with Federal criminal prosecutions, and where Mr. Justice Stewart's concurring opinion (needed to make up the majority of five Justices) expressly rested on the sole ground of an unwillingness to interfere with these *State* procedures. The Court's concern over fair due process procedures in cases involving the "other crimes" problem was shown again just last week in *Specht* v. *Patterson,* U.S.S. Ct., Oct. Term 1966, No. 831, 35 U.S. Law Week 4340 (April 11, 1967).

We therefore respectfully submit that the statute under which petitioner has been prosecuted and convicted is unconstitutional either on its face, or as applied, by reason of due process violation of the "other crimes" rule and the attendant principle forbidding compulsory self-incrimination.

II.

A. The petitioner was denied due process of law through unreasonably being refused an opportunity to prepare his defense on the issue of whether he had in fact signed or executed the bail bond whose forfeiture was an element to be proved in establishing his alleged guilt of the indictment charges.

B. The petitioner was denied a fair trial on the issue of validity of the bail bond because the Trial Court refused to instruct the jury as to the theory of the defense in that regard even though there was evidence in support of the defense.

This case was called for trial October 5, 1966 (R. 1-2). Petitioner had been apprehended, by FBI Agent Maloney, on July 29, 1966 (R. 102-112). He was arraigned and pleaded not guilty August 26, 1966 (1a). He was given until September 19, 1966 for motions "for all purposes" (1a). In the interim between the arraignment and the date set for motions, and in the interim between the date set for motions (September 19, 1966) and the date of commencement of trial (October 5, 1966) defense counsel was endeavoring, with all diligence (we submit), to master the case and to develop a defense; see the trial colloquy at R. 2-15, where, we must say, the defendant's trial counsel depicted to the Trial Court an altogether reasonable and appealing factual situation justifying the defense request for an adjournment of thirty days in order to afford to the defense an opportunity to develop the evidentiary indications that the bail bond on which the Government's case depended (the District of Columbia bond of October 1, 1964) had not in fact been signed or executed by the defendant. The request for adjournment was refused, and we must respectfully

state that this refusal seems to us incomprehensible in view of defense counsel's presentation at R. 2-15.

Still, being forced to trial under these "rush" circumstances for which no justification seems to be apparent, defense counsel, utilizing with skill and valor the virtually sole opportunity which remained open to him, *viz.*, the cross examination of the bail bondsman, Mr. Senge, and the typographical or calligraphic indicia appearing on the face of the bail bonds of July and October, 1964, did develop on the trial record a picture which, we submit, cast at least serious doubt upon the Government's contention that petitioner Romano had in fact signed and executed the herein operative bail bond of October 1, 1964. See our description *supra* of the bail bonds and of the cross examination of Mr. Senge. This is not the place for us to argue in meticulous detail the extremely disturbing indications afforded by Mr. Senge's testimony (on cross examination) that a miscarriage of justice has *in fact* occurred in this case on the cardinal issue of whether petitioner Romano did in fact sign or execute the bail bond involved. For, on the present trial record and in the procedural setting in which the defense at this trial was obliged to proceed after denial of its eminently reasonable request for adjournment, the trial-procedural *fait accompli* did inevitably become one in which the issue was for the Jury—and not for the Appellate Courts. Our contention, rather, is, that (1) we were denied an adequate due process opportunity to prepare and to present this all-important factual issue for the Jury's consideration, and (2) that trial counsel for petitioner Romano did nevertheless raise a sufficient factual question at the trial, on this issue, to entitle us to urge further as follows:

Despite timely requests by defense counsel (*infra*), the Trial Court flatly and absolutely refused to charge the

Jury that a prime theory of the defense was the invalidity of the alleged bail bond of October 1, 1964 by reason of Romano's non-signing and non-execution thereof. In the Court of Appeals the Government incorrectly argued that the defense did not make a timely request for a jury instruction on the defense theory of the invalidity of the bond. This issue ran centrally through the whole trial (R. 131-139, 183-184, 187-189, 194-195, 196-197; 18a-19a, 22a-24a, 29a-30a, 31a-32a). It was scarcely to be anticipated that the Court would totally omit from its charge to the Jury any reference to this prime aspect of the defense case. And when the Court, after concluding its main charge to the Jury, invited counsel to state their exceptions, defense counsel did expressly request a supplemental charge on the point in question which was refused (R. 194-195; 29a-30a).

The Government also contended in the Court of Appeals that we were not entitled to a jury charge on the defense theory of the invalidity of the bail bond because there was no evidence to support our theory. The argument that there is no evidence to support our theory overlooks the familiar principle that in a criminal prosecution the accused is entitled to the benefit of evidence favorable to him which is introduced by the prosecution, including the benefit of such evidence which is adduced on cross examination of witnesses for the prosecution. This rule is authoritatively formulated in 23 *Corpus Juris Secundum* 579-580 ("Criminal Law", §908). As shown *supra,* the cross examination of the bail bondsman, Mr. Senge, revealed numerous and important flaws in the Government's case as to the validity of the bail bond; and several important discrepancies pointing to the questionable validity of the October 1st bond were revealed by comparison of that bond with the earlier one (see, e.g., R. 133-139).

It is hardly necessary to cite authority for the proposition that a defendant in a criminal prosecution is entitled to a proper Jury instruction presenting his theory of the defense where the evidence presents such theory and the Court's attention is particularly directed to it. E.g., *Levine* v. *United States,* 261 F.2d 747 (C.A.D.C. 1958) (collecting the authorities).

* * * * *

The Government also contended in the Court of Appeals that the policy of punishing fugitives precludes allowing a defense of invalid execution of a bail bond. The sufficient answer to this argument is that the Government chose to prosecute in this case under the bail-jumping statute, not under the general "fugitive" statute, 18 U.S.C. §1073; under the latter statute bail jumping does not become an issue, but rather it is the fugitivity itself which is punishable. The bail-jumping statute is just that, a statute to punish persons who violate their obligations under a bail bond. It is preposterous for the Government to contend that there does not have to be a validly executed bail bond in a prosecution for violating the obligations of a bail bond.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM GLASSER,
JEROME LEWIS,
Attorneys for Petitioner,
Arnold Romano.

APPENDIX

Judgment of Court of Appeals
(filed February 23, 1967)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of February one thousand nine hundred and sixty-seven.

Present:

HON. HENRY J. FRIENDLY,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ARNOLD ROMANO,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1282

ARNOLD ROMANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals affirmed without opinion.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1967. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to April 17, 1967, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the bail jumping statute, prior to its recent amendment, was unconstitutional on its face in

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that, when a defendant who forfeited bail was under a felony charge, the fact of such charge would be disclosed to the jury.

2. Whether petitioner's conviction should be reversed because the jury was told he was charged with a felony.

3. Whether petitioner was denied an opportunity to prepare a defense.

4. Whether the trial court properly refused to give requested instructions.

STATUTE INVOLVED

18 U.S.C. 3146, effective until September 20, 1966, provided:

> Whoever, having been admitted to bail for appearance before any United States commissioner or court of the United States, incurs a forfeiture of the bail and willfully fails to surrender himself within thirty days following the date of such forfeiture, shall, if the bail was given in connection with a charge of felony or pending appeal or certiorari after conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or, if the bail was given in connection with a charge of committing a misdemeanor, or for the appearance as a witness, be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> Nothing in this section shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt.

STATEMENT

After a jury trial, petitioner was convicted in the United States District Court for the Southern District of New York of jumping bail in violation of 18 U.S.C. 3146.[1] On October 28, 1966, he was sentenced to imprisonment for five years. The court of appeals affirmed without opinion.

George Senge, a bail bondsman in the District of Columbia, testified that on July 27, 1964, he executed a bail bond (not here in issue) in the amount of $50,000 in the Clerk's office at the United States Court House, District of Columbia (Tr. 49–53).[2] At that time, only one blank form was supplied (Tr. 75), and petitioner signed only one (Tr. 69–70). Subsequently, on October 1, 1964, in connection with proceedings to remove petitioner to the Southern District of New York, petitioner executed a second bond in the amount of $50,000. Petitioner's signature was acknowledged by one Hugh Kline, a clerk for the United States District Court for the District of Columbia (Tr. 49–54, 85–87).

On April 27, petitioner's case was called for trial in the Southern District of New York. Petitioner, who had been notified of the trial date (Tr. 127–129), was not present, and his bond was forfeited (Tr. 32–34).

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[1] Pursuant to the Bail Reform Act of 1966 (P.L. 89–465; 80 Stat. 214), which became effective on September 20, 1966, Section 3146 has been revised and recodified as 18 U.S.C. 3150.

[2] References are to the transcript of trial ("Tr."), and to the Appellee's Appendix in the court of appeals ("G."), both of which are on file with the Clerk of this Court.

On July 30, 1966, petitioner was arrested in Fort Lauderdale, Florida (Tr. 102–106). At the time of his arrest, petitioner was carrying false identification (Tr. 108–109).

ARGUMENT

1. Petitioner argues that 18 U.S.C. 3146 was invalid, either on its face or as applied, because the fact that a defendant was charged with a felony at the time he forfeited bail was an element of the offense and was therefore brought before the jury. Assuming this to be so, it would not render the statute unconstitutional. The fact that relevant evidence may disclose the commission of another crime does not bar the use of such evidence. *United States* v. *Montalvo,* 271 F. 2d 922, 927 (C.A. 2); *United States* v. *Krulewitch,* 145 F. 2d 76, 80 (C.A. 2); 1 Wigmore on *Evidence* §§ 215–216 (3d ed. 1940). *A fortiori,* a statute would not be unconstitutional merely because, as a necessary part of the proof, it became relevant to show that a defendant was merely charged with having committed a felony. There would ordinarily be no occasion to bring the particulars of the crime charged to the jury's attention.

Here the indictment (Pet. 5) simply alleged that bail had been given "in connection with a charge of felony contained in Indictment No. 64 Cr. 828 * * *." Petitioner never moved under Rule 7(d), F. R. Crim. P., to strike the reference to a felony from the indictment, and the indictment was neither read

nor given to the jury. At petitioner's request, the government was precluded from disclosing to the jury that the underlying crime was a narcotics offense (Tr. 16–17). At trial, the fact that petitioner had been charged with a felony was proved by introduction of docket entries and by testimony that petitioner was observed entering a plea of not guilty in the Southern District of New York.

Petitioner raised no constitutional objection prior to appeal; he can hardly object now to a procedure that he requested and assented to. In addition, since petitioner urges (Pet. 13–15) that the infirmities he purports to find in Section 3146 have been cured by the recent statutory revision (see n. 1, supra, p. 3), it is apparent that the principal issue tendered by the petition is of no continuing importance.

2. Petitioner was arrested on July 30, 1966. At petitioner's request, arraignment on the present indictment was continued from August 17 until August 26. (G. 2–3). On August 26, petitioner entered a plea of not guilty, and the court granted him an additional three weeks for the return of all motions (G. 4–6). Pre-trial motions were heard on September 26. Petitioner's motion for an inspection of the original bonds was denied, as the bonds were then on file in the Supreme Court. (G. 17–18, 20).[3] The case was ad-

[3] The original bonds were filed with the Clerk of this Court in connection with *Joseph Armone* v. *United States*, No. 603, O.T. 1966, certiorari denied, 385 U.S. 957.

journed to October 3 (G. 21). In the interim, the bonds were returned to the clerk of the court of appeals in order to facilitate inspection by petitioner. On October 3, petitioner again moved for a continuance of 30 days, protesting that he had not had time to have the original bonds examined by a handwriting expert (G. 23–24). The trial court observed that the original bonds were then located in the very same building as the trial court. Accordingly, petitioner was granted two days in which to complete his inspection of the bonds (G. 24).

Petitioner's contention (Pet. 17–18) that he was denied due process of law in that he was not given time to prepare a defense is without merit. At no time did petitioner attempt to make arrangements with the Clerk of this Court, or with the Clerk for the Second Circuit, to examine the bonds. Under these circumstances, the trial court did not abuse its discretion in denying petitioner's motion evidently made only for purposes of delay.

4. Petitioner's contention (Pet. 18–20) that the trial court erroneously refused to charge his theory of defense—that petitioner did not execute the bond on October 1—completely ignores the court's instructions with respect to the elements of the offense

(Tr. 187–188).[4] Even if there were sufficient evidence to warrant the requested charge,[5] the court's instructions adequately advised the jury that to convict they would have to find that petitioner did in fact execute the appearance bond on October 1, 1964. That the jury was acutely aware of the necessity of establishing this fact (the absence of which was argued to the

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[4] The court charged, *inter alia* (Tr. 187–188):

"Secondly [in order to convict], you have to be persuaded beyond a reasonable doubt that he [petitioner] was admitted to bail on that charge—that is, that he filed this bail bond in Washington as a condition for his appearance in the Southern District of New York."

[5] Petitioner suggests (Pet. 7) that a fair reading of the record discloses that he did not in fact execute the October 1 bond—that the October 1 bond was inadvertently signed when he executed the July 27 bond. No evidence to that effect, however, was introduced; indeed, as noted above (p. 3), it was categorically denied that two bond forms were supplied on July 27 (Tr. 75), or that petitioner signed more than one bond (Tr. 69–70). At best, petitioner's cross-examination of Senge revealed that the latter did not remember certain minor and insignificant occurrences, such as who signed the bonds first (Tr. 59, 90); who filled in the addresses on the bond forms (Tr. 66–67, 87–89); if both Senge and Romano used the same pen (Tr. 87); the exact words of the oath administered by the clerk (Tr. 67–68); the exact time of day when the bond was executed (Tr. 78–82); and whether or not he talked to the clerk (Tr. 81–86).

jury) is evidenced by the jury's request for a magnifying glass to examine the bonds (Tr. 198).

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

MAY 1967.

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